BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JULIO C. MENDOZA	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,037,338
ROCK SOLID ROOFING	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the January 18, 2008, preliminary hearing Order for Compensation entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

On October 19, 2007, claimant fell from a roof, which fractured his left arm and injured his low back. In the January 18, 2008, Order for Compensation, Judge Fuller granted claimant's request for benefits.

Respondent and its insurance carrier contend Judge Fuller erred. They argue claimant was not working for respondent at the time of the accident and, therefore, claimant's request for workers compensation benefits should be denied. Conversely, claimant contends the Order for Compensation should be affirmed.

The only issue before the Board on this appeal is whether claimant's accident arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member concludes the January 18, 2008, Order for Compensation should be affirmed.

Respondent is a Missouri roofing company that is operated by Chris Rubio. It is not entirely clear at this juncture whether respondent is a sole proprietorship, partnership,

corporation, or some other entity; but Mr. Rubio testified he was self-employed.[1] In any event, Archer Daniels Midland (ADM) contracted with respondent to perform work on a building located near Goodland, Kansas. And respondent hired claimant on a temporary basis to assist in that work.

Shortly after commencing work on the ADM project, Mr. Rubio returned to St. Louis, Missouri, to obtain more roofing materials. But respondent's roofing crew remained in Goodland. On October 19, 2007, the day following Mr. Rubio's departure, respondent's roofing crew began working on the roof of a residence. Claimant fell from the roof and fractured his left arm and injured his low back.

Claimant was immediately transported to Wesley Medical Center in Wichita, Kansas, where he was admitted for treatment and underwent left arm surgery. On October 22, 2007, claimant was discharged from the hospital with a secondary diagnosis of at least one fractured transverse process in the lumbar spine. At this juncture, claimant's medical expense exceeds $30,000.

As indicated above, the sole issue on this appeal is whether claimant's accident arose out of and in the course of his employment with respondent.

Mr. Rubio acknowledges respondent does mostly residential roofing, but he denies that respondent was performing the roofing work on the residence where claimant was injured. The greater weight of the evidence, however, does not support that contention.

Claimant testified Mr. Rubio wanted the roofing crew to work on the residence the day before claimant's accident but it was too windy. Through an interpreter, claimant testified, in part:

> That day in the morning, Chris [Rubio] lived with us in the same trailer. He was there and we went to the [ADM] building. The wind was very strong, and because we had the harness, the wind would just make us swing back and forth.
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> Then he already had the house. He had already told us that we had to do the roof -- the roof on that house. So -- so we couldn't work at the [ADM] building, so he send us to the house. But we didn't want to go because the wind was very dangerous and we could fall. So he said, the following day, that we had to go while he went to get the material in Missouri. So we finished the house and we started the building.
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> . . . .

[1] Rubio Depo. at 4.

> I will try to clarify. We couldn't work at the building because of the wind, but he wanted us to work so he wanted us to go to the house, but the wind wouldn't let us that day. So then the following day in the morning, at 4:00, he got us up so we could go finish the house. He wanted to have it done by noon; and then the rest of that afternoon, he wanted us to go to the [ADM] building.[2]

Claimant's friend and co-worker, Ramon Holguin, corroborated claimant's testimony.

> On Thursday I think it was, on Thursday we went to work at the [ADM] warehouse, but it was very windy and we had to get down, and we got down, but Chris [Rubio] called Sergio and told him that we needed to go do that little house.
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> . . . .
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> [The next day] We got up early, about 4:00 or 5:00 in the morning, something like that, and we went to the house, to that house, to tear down the old material that was on there and to put on the new one.[3]

Moreover, Mr. Rubio acknowledged that when he was absent an individual named Sergio was in charge of the roofing crew.

Under the Workers Compensation Act an employer is required to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] "Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case."[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the

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[2] P.H. Trans. at 13, 14.

[3] Holguin Depo. at 9, 10.

[4] K.S.A. 2007 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

The undersigned finds that working on the residence where claimant fell was an incident of his employment. The greater weight of the evidence establishes that Mr. Rubio wanted the crew to work on that house. Moreover, Sergio took the crew to the residence to work. Accordingly, the undersigned affirms the Judge's finding that claimant's accident arose out of and in the course of his employment with respondent.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned Board Member affirms the January 18, 2008, Order for Compensation entered by Judge Fuller.

IT IS SO ORDERED.

Dated this ____ day of March, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Ali N. Marchant, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge

[6] *Id.* at 278.

[7] K.S.A. 44-534a.